

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VINCENT L. WEBB; et al.

Civil No. 02-645-CO

Plaintiffs,

FINDINGS AND RECOMMENDATION

v.

CHRIS FAIN; et al.

Defendants.

COONEY, Magistrate Judge:

Dr. Hong, as assignee of the claims of plaintiff CD Micro, Inc., has filed a motion for voluntary dismissal (#91) of all claims of CD Micro, Inc., against defendant Fain. Dr. Hong represents that the motion is made pursuant to a stipulation between Dr. Hong and defendant Fain.

I. DISCUSSION

Federal Rules of Civil Procedure provides in pertinent part that, subject to certain limitations, an action may be dismissed without order of the court by filing a stipulation of dismissal signed by all parties who have appeared in the action. Fed. R. Civ. P. 41(a)(1)(ii). Further, after a defendant has filed an answer or motion for summary judgment, an action may be dismissed voluntarily at plaintiff's request only by order of the court and "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). In the Ninth Circuit, "Although costs and attorney fees are often

imposed upon a plaintiff who is granted a voluntary dismissal under Fed.R.Civ.P. 41(a)(2), no circuit court has held that payment of the defendant's costs and attorney fees is a prerequisite to an order granting voluntary dismissal." Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir. 1989) (and cases cited). Here, Dr. Hong requests that dismissal be with prejudice and without fees or costs, and states that a stipulation has been entered into between him and defendant Fain.

The court finds that, in the circumstances, this action should be dismissed as to any claims of plaintiff CD Micro, Inc., against defendant Fain, with prejudice and without costs and fees imposed.

II. RECOMMENDATION

For the foregoing reasons, the motion to dismiss defendant Fain only, brought by Dr. Hong, as assignee of the claims of plaintiff CD Micro, Inc. (#91), should be granted, with prejudice, and without fees and costs.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. **The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have ten days within which to file a response to the objections.** Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the

Magistrate Judge's recommendation.

DATED this 15 day of November, 2005.


UNITED STATES MAGISTRATE JUDGE